SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

74-170

CASE NO: A-1323

ROBERT JAMES ANDRINO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, ROBERT JAMES ANDRINO, respectfully prays for the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals, for the Ninth Circuit, entered on May 8, 1974, rehearing denied June 20, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals, for the Ninth Circuit, entered May 8, 1974, not yet reported, appears in the appendix hereto as Appendix A. Denial of Rehearing which was entered on June 20, 1974, and, appears as Appendix B. Adjudication of Guilty and Sentence entered by the United States District Court, Phoenix, appears as Appendix C. A copy of the charge appears as Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit, was entered May 8, 1974. A timely petition for rehearing was denied on June 20, 1974. Order extending time to file petition for writ of certiorari was granted on July 25, 1974. A copy is annexed hereto as Appendix E.

This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

WHEN FELONY CONVICTIONS ARE SET ASIDE, PURSUANT TO THE LAWS OF CALIFORNIA AND NEVADA, CAN ONE BE CONVICTED UNDER THE FEDERAL CODE FOR ACQUISITION OF A FIREARM BY FALSELY STATING THAT HE WAS NOT A CONVICTED FELON?

II

IS A DEFENDANT DEPRIVED OF HIS RIGHT TO APPEAL WHEN AN APPELLATE COURT FAILS TO CONSIDER MANY COUNTS OF AN INDICTMENT FOR THE REASON THAT IT AFFIRMED OTHER COUNTS?

III

IS ENFORCEMENT OF FEDERAL LAW, AGAINST ARBITRARILY SELECTED GROUPS, CONSTITUTING A "WATCH LIST", DENIAL OF CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment of the United States Constitution

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . . ."

14th Amendment of the United States Constitution

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

18 U.S.C. Section 922(a)(6)

"(a) It shall be unlawful —

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other deposition of such firearm or ammunition, under the provisions of this chapter."

18 U.S.C. § 924(a)

"Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or

exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000.00, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

18 U.S.C. APP. § 1202(a)(1)

"(a) Any person who —

(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony, or . . . and

(a) who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this act, any firearm shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both."

California Penal Code, § 1203.4

"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty or nolo contendre and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be

released from all penalties and disabilities resulting from the offense or crime of which has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change in plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant or any other offense, such prior conviction may be pleaded and proved and have the same effect as if probation had not been granted or the accusation or information dismissed. Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."

Nevada Revised Statutes, § 176.225

"Honorable discharge from probation.

1. Every defendant who:

(a) Has fulfilled the conditions of his probation for the entire period thereof, or

(b) Is recommended for earlier discharge by the chief parole and probation officer, or

(c) Has demonstrated his fitness for the honorable discharge but because of economic hardship, verified by a parole and probation officer, has been unable to make restitution as ordered by the court, may at any time thereafter

be permitted by the court to withdraw his plea of guilty or nolo contendre and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty and in either case, the court shall thereupon dismiss the indictment or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.

2. The probationer shall be informed of this privilege in his probation papers.

3. The probationer may make such application and change of plea in person or by attorney, authorized in writing, or by a parole and probation officer authorized in writing; but in any subsequent prosecution of the defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation has not been granted or the indictment of information had not been dismissed.

4. The clerk of the court shall notify every person who, and every agency who, to his knowledge has obtained from the court or clerk knowledge of the conviction that the probationer has been honorably discharged and is released as provided in Subsection 1.

5. Any amount of restitution remaining unpaid constitutes a civil liability arising upon the date of discharge.

STATEMENT OF THE CASE

Petitioner, ROBERT JAMES ANDRINO, was indicted in Phoenix, Arizona, on twelve counts of firearms violations. Counts one through six of the indictment charged the Petitioner with making false and fictitious statements in connection with the acquisition of a firearm, in violation of 18 U.S.C. Section 922(a)(6) and 924(a). Count seven charged the Petitioner with receipt, by a convicted felon, of a firearm, transported interstate, in violation of 18 U.S.C. App. Section 1202(a)(1). In Counts eight through twelve, Petitioner was charged with possession by a felon of firearms, transported interstate in violation of 18 U.S.C. App. Section 1202(a)(1) (R. 1-6).

Petitioner waived right to trial by jury and was found guilty by the Court of all twelve counts charged in the indictment (Tr. 91). Judgment and commitment were entered on May 15, 1972 (Tr. 93). Petitioner was remanded to the custody of the Attorney General for a term of imprisonment of two years on each count, one through twelve, to be served concurrently. It was additionally ordered by the Court that all of such sentences were to be served consecutively to a sentence imposed prior to this conviction. Appeal was timely filed. The Appellate Court affirmed the decision below as to counts one through six, deeming it thereby unnecessary to rule on the remaining counts.

Petition for rehearing was denied on June 20, 1974. On July 25, 1974, an order was entered extending the time to file petition for writ of certiorari to August 19, 1974.

STATEMENT OF FACTS

The Petitioner, ROBERT JAMES ANDRINO, was found guilty on a felony charge of conspiring to commit acts of prostitution in Hollister, California on October 6, 1959 (Tr. 43-44). Subsequently, he was convicted of the felony of swindling in Alko, Nevada on January 4, 1963 (Tr. 43-44).

Thereafter, under the provisions of Section 1203.4 of the California Penal Code and Section 176.225 of the Nevada Revised Statutes, the charges were dismissed and the verdicts of guilty were set aside and the Petitioner was released from all penalties and disabilities resulting from the offenses (Tr. 21, 23, 28).

On June 18, 1970 (R. 1), August 19, 1970 (R. 2) and August 26, 1970 (R. 3) Andrino purchased various firearms, from licensed gun dealers. He, at the time of the purchase, affixed his signature to firearms transaction records (Tr. 19) stating that he had not been convicted of any crime punishable by a term of imprisonment exceeding one year, and stating, at the time of the purchase, he was not a convicted felon (Tr. 28).

The trial record reflected the fact that Petitioner's name was on a special watch list of particular individuals selected by agents of the Alcohol, Tobacco and Firearm Division, assigned to what is known as "organized crime."

REASONS FOR GRANTING THE WRIT

POINT ONE

I

WHEN FELONY CONVICTIONS ARE SET ASIDE, PURSUANT TO THE LAWS OF CALIFORNIA AND NEVADA, CAN ONE BE CONVICTED UNDER THE FEDERAL CODE FOR ACQUISITION OF A FIREARM BY FALSELY STATING THAT HE WAS NOT A CONVICTED FELON?

Counts one through six of the indictment charged the Petitioner with making false and fictitious statements to a licensed gun dealer, in connection with the acquisition of a firearm (R. 1-6). Proof of this offense depends upon a showing that the Petitioner was, at the time of acquisition, a convicted felon. However, although Andrino entered a plea of guilty to a charge of conspiracy to commit acts of prostitution in Hollister, California, on October 6, 1969, and pled guilty to a swindling charge at Alco, Nevada on January 4, 1973, under the laws of each state, his guilty plea was thereafter withdrawn and a plea of not guilty was filed in relation to each conviction (Tr. 21, 23).

Petitioner was then released from all penalties and disabilities resulting from the crime of which he had originally been convicted in each state. At the time the charges were dismissed against him in California, the Defendant was informed that his rights had been restored, and that he would "never have to be called an ex-convict or ex-felon" again (Tr. 33). At no time during

Andrino's affixation of his signature to various firearms transaction records, referred to in counts one through six of the indictment, did he believe himself to be a convicted felon (Tr. 26-29).

The original status of Petitioner, as a convicted felon, resulted from violation of California and Nevada law. It was not created through violation of federal law.

The change of status from convicted felon to one against whom charges had been dismissed, i.e., not a convicted felon, also resulted from operation of California and Nevada law and California and Nevada courts.

In 1968 federal gun control legislation was enacted. The link between that legislation and the conviction sought to be reviewed was the status of Petitioner, at the time he purchased the firearms, presenting himself to be a person who was not a convicted felon.

It would appear, legally, that at a minimum, it must be conceded that a reasonable doubt existed as to Andrino's status.

In **People v. Taylor**, 178 Cal. App. 2d 472, 3 C.R. 186 (1960), Taylor was charged with being a felon in possession of a firearm, and thus, in violation of Penal Code, Section 12021. The evidence presented at trial showed that the defendant had been granted relief under Penal Code, Section 1203.4. The sole question on appeal was: "Whether a prior felony conviction which, pursuant to Penal Code, Section 1203.4, has been set aside, the information dismissed and the defendant released from all penalties and disabilities, is nevertheless a prior felony within the meaning and purview of Penal Code, Section 12021."

The court held that the defendant could not be charged with violation of Penal Code, Section 12021, since relief had been afforded to her under Penal Code, Section 1203.4. In reaching their conclusion, the court relied upon the analysis of **Kelly v. Municipal Court**, 160 Cal. App. 2d 38, 324 P. 2d 990 (1958).

The Nevada courts have not yet spoken on the subject.

Just as the federal courts would have no jurisdiction to convict for a violation of state law, so it is urged that the federal courts should recognize the full effect and result of the states' criminal laws, including the pardon system enacted by a state legislature.

The state criminal codes are not uniform. Congress may not make them so. Activities illegal in one state, may not be in another.

POINT TWO

II

IS A DEFENDANT DEPRIVED OF HIS RIGHT TO APPEAL WHEN AN APPELLATE COURT FAILS TO CONSIDER MANY COUNTS OF AN INDICTMENT FOR THE REASON THAT IT AFFIRMED OTHER COUNTS?

The United States Court of Appeals, Ninth Circuit, under the Concurrent Sentence Doctrine, declined to rule on counts seven through twelve, inclusive, under the authority of **United States v. Gaines**, 460 F.2d 176 (2nd Cir. 1972).

In Gaines, however, it is pointed out that since **Benton v. Maryland**, 359 U.S. 784, 89 S.Ct. 4056, 23 L.Ed.2d 707 (1969), the United States Court of Appeals, Second Circuit, has, in the main, reviewed all the counts of a multi-count conviction, when concurrent sentences have been imposed, even though the conviction, on at least one count, was clearly sustainable.

In **Benton**, supra, this court recognized the fact that most criminal convictions do, in fact, entail adverse collateral legal consequences. See **Sibron v. New York**, 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968).

Although the Concurrent Sentence Doctrine does provide for judicial convenience, the failure to reverse, if reversal is appropriate, of six convictions, under six counts of an indictment, can have immediate collateral results. It is possible, for example, that had those counts been reversed, an immediate effect might have been realized in submission of the case for mitigation of sentence, under Rule 35 of the Federal Rules of Criminal Procedure.

The conviction, on violation of two sections of the federal law, as opposed to one, may have further serious collateral consequences in that under 18 U.S.C., Section 924(a), immediate parole is possible under the terms of the act, while under 18 U.S.C. App. 1202(a)(1) the same eligibility for parole does not appear in the act.

It is respectfully submitted, therefore, that although the sentences were nominially concurrent, the availability of relief from imprisonment is not identical.

In this case, each of the counts, which the Circuit Court declined to rule upon, involved a single question of law.

Benton, supra, when read with the concurring opinion, would lead to the belief that this court intended the use of the Concurrent Sentence Doctrine to be the exception and not the rule. The failure to determine the entire case, here, leads to an interesting and unusual situation. The United States Court of Appeals, Ninth Circuit, failed to distinguish between the interstate commerce requirement of 18 U.S.C., Section 922(a)(6) and 18 U.S.C. App. 1202(a)(1).

The court below discussed the fact that it did not have to consider interstate commerce since no reference to intrstate commerce is requird in 18 U.S.C. 922(a)(6). The effect of failing to consider counts seven through twelve was to void consideration of the threshhold jurisdictional question of interstate commerce altogether, since such connection with commerce is required under 18 U.S.C. App. 1202(a)(1).

Under such circumstances, it is suggested that the convenience reflected by the Concurrent Sentence Doctrine is more than off-set by the avoidance of necessary jurisdictional problems inherent in the factual questions presented to the court.

POINT THREE

III

IS ENFORCEMENT OF FEDERAL LAW, AGAINST ARBITRARILY SELECTED GROUPS, CONSTITUTING A "WATCH LIST", DENIAL OF CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The United States Court of Appeals, Tenth Circuit, considered the Petitioner's contention that the government's maintenance of his name on a "watch list" of possible suspects, was an arbitrary act of discrimination, unsupported under the Fourteenth Amendment.

In rejecting the argument, the court relied upon authority not applicable to the situation. **United States v. Thoresen,** 428 F.2d 654 (9th Cir. 1970), **United States v. Synnes,** 438 F.2d 764, 771-772 (8th Cir. 1971) vacated on other grounds 404 U.S. 1009 (1972) and **United States v. Karnes,** 437 F.2d 284, 289 (9th Cir. 1971) cert. den. 402 U.S. 1008 (1971).

The cases cited concerned themselves with the prior conviction aspect of the law. Petitioner is concerned with conviction, without accusation, trial or confrontation by witnesses, when he is labeled (without foundation or fact) as a member of "organized crime."

The use of "strike force" attorneys working on "organized crime;" the use of United States agents, working on the same matters, has created a serious constitutional problem in trials in the federal courts. The same problem follows to incarceration, where the label persists.

Frequently, a Defendant is not aware of the label.

There is, however, no federal Judge who is not aware of the implications of a case being presented by a "strike force" attorney rather than as Assistant United States Attorney. That was the point raised in the United States Court of Appeals, Ninth Circuit. The opinion sought to be reviewed does not address itself to that point.

The attack upon this method of conviction of being a member of a particular group, without accusation, trial or hearing, is supported by **Wisconsin v. Constantineau,** 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). That court held that a state statute which provided for the "posting," without notice or hearing, of any person who was an excessive consumer of alcoholic beverages constituted an unconstitutional violation of procedural due process. It is precisely that type of activity engaged in by the government in arbitrarily and clandestinely placing the appellant's name upon a "select list" of known felons that the **Constantineau** Court sought to curtail by prohibiting the invasion of one's property or interests without providing for notice and a full and fair opportunity to be heard.

Similarly, in **Yick Wo v. Hopkins,** 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the United States Supreme Court struck down various ordinances which were being enforced in a manner which operated to discriminate against persons of Chinese descent.

CONCLUSION

Petitioner respectfully suggests the propriety of the issuance of the Writ so that the entire record may be reviewed.

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/s/ Milton E. Grusmark

MILTON E. GRUSMARK

CERTIFICATE

I, MILTON E. GRUSMARK, attorney for Robert James Andrino, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of August, 1974, I mailed copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit, as follows:

On the United States by mailing a copy of same to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ Milton E. Grusmark

MILTON E. GRUSMARK